U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 25 2019 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel Nitsmo for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be dismissed.

The petitioner indicates that it is a general dentistry business. It seeks to employ the beneficiary permanently in the United States as a dentist under section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the marriage fraud bar under section 204(c) of the Act applies to the case and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the issue in this case is whether or not the marriage bar under section 204(c) of the Act applies to this case.

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

> Notwithstanding the provisions of subsection (b)[1] no petition shall be approved if:
>
> (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
> (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

As a basis for denial, it is not necessary that the beneficiary have been convicted of, or even prosecuted for, the attempt or conspiracy to enter into a marriage for the purpose of evading the immigration laws. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative so that the director could reasonably infer the attempt or conspiracy. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

Tawfik at 167 states the following, in pertinent part:

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[1] Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

> Section 204(c) of the Act . . . prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative.

(citing *Matter of Kahy*, Interim Decision 3086 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972); and 8 C.F.R. § 204.1(a)(2)(iv) (1989)).

A decision that section 204(c) of the Act applies may rely on any relevant evidence in the record, including evidence from prior U.S. Citizenship and Immigration Services (USCIS) proceedings involving the beneficiary. The adjudication must, however, reach an independent conclusion and should not ordinarily give conclusive effect to determinations made in prior collateral proceedings. *Id.*; *Tawfik* at 168.

The director's March 13, 2012 decision indicates that he denied the Form I-140 petition under section 204(c) of the Act based on a check of USCIS electronic records, which reflected that the beneficiary had been placed in removal proceedings "due to a finding in which he had previously entered into a marriage with US Citizen [redacted] for the sole purpose of obtaining immigration benefits." The director also indicated that he would not accept a June 30, 2009 affidavit from [redacted] which had been submitted in response to his November 21, 2011 Notice of Intent to Deny (NOID), as the signature on the affidavit did not appear genuine and the statement did not confirm to the requirements for affidavits.

On appeal, counsel asserts that the Form I-140 petition was denied in error. She contests the director's finding that the beneficiary was put into removal proceedings based on a determination that he was subject to section 204(c) of the Act. Counsel states that the Form I-862, Notice to Appear, was issued to the beneficiary on October 22, 2009 because he was out of status.

Counsel also submits a new affidavit from [redacted] to rebut the director's concerns regarding her signature on her June 30, 2009 affidavit. Counsel further contends that USCIS should have provided the petitioner with an opportunity to respond to the allegations lodged in the director's decision prior to its issuance since the single issue raised in the NOID did not constitute the full basis for denial.

At the outset, the AAO acknowledges counsel's statement regarding the basis of the Notice to Appear (NTA) issued to the beneficiary on October 22, 2009. A copy of the NTA included in the record establishes that the beneficiary was charged under section 212(a)(7)(A)(i)(I) of the Act as an

immigrant who "is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act." Accordingly, the beneficiary was not placed into proceedings based on a finding of marriage fraud under section 204(c) of the Act. Moreover, the director's decision indicates that it is based on a USCIS record of a prior finding of marriage fraud and, therefore, was not independently reached pursuant to *Tawfik*. Accordingly, the director's decision is withdrawn and the AAO will consider *de novo* whether the record establishes that section 204(c) of the Act applies in the present case. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3rd Cir. 2004). [2]

The AAO is not, however, persuaded by counsel's assertion that the director's denial of the Form I-140 petition was based on an issue not raised in the November 21, 2011 NOID or that the director was obligated to have issued a second NOID to the petitioner prior to issuing his March 13, 2012 decision. It finds the director's NOID to have clearly articulated his intention to deny the Form I-140 petition under section 204(c) of the Act, the basis for his subsequent denial of the petition. Further, the record fails to demonstrate that the director's decision was based on derogatory information that would have required notice to the petitioner.

Pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i), USCIS is required to notify applicants or petitioners of any derogatory information of which they are unaware prior to issuing adverse decisions, giving them the opportunity to respond. That is not the case here. The director noted that signature on her June 30, 2009 affidavit was noticeably different from that on her divorce certificate, information that was available to the petitioner at the time it submitted these documents for the record. The AAO also notes that the director did not base his 204(c) determination on the suspect affidavit, but rather indicated that he would not accept it as credible evidence in support of the *bona fides* of the beneficiary's marriage. Moreover, even if the AAO were to find the director to have erred in failing to notify the petitioner of his concerns regarding signature on the affidavit, it is not clear what remedy would be appropriate beyond the appeal process itself, which the petitioner has used to submit a new affidavit signed by attesting to the nature of her marriage to the beneficiary.

The AAO now turns to a consideration of whether the record provides the substantial and probative evidence required to establish that the beneficiary in this case married a U.S. citizen solely for the purpose of obtaining a benefit under the Act.

The record contains a June 27, 2006 sworn statement from taken during an investigation conducted by officers of Immigration and Customs Enforcement (ICE). In her affidavit, states, under oath, that her marriage to the beneficiary was never legitimate,

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

that they never lived together and that their marriage was never consummated. She indicates that she married the beneficiary to help him stay in the United States. At the time of her interview, also signed a statement withdrawing the Form I-130, Petition for Alien Relative, that she had filed on behalf of the beneficiary on October 14, 2004.

To establish that the beneficiary and entered into a genuine marriage, the petitioner resubmits documentation originally provided to support the appeal of a July 15, 2008 denial of a prior Form I-140 petition filed on behalf of the beneficiary. This documentation includes:

- A copy of an undated email sent to the beneficiary from "PJS," transmitting the wording of a statement that was subsequently signed " " before a notary public on June 30, 2009.

- A copy of the signed June 30, 2009 affidavit in which contends that she married the applicant for love and that the immigration petition she filed on his behalf was a result of the marriage, not the reason for it. In the affidavit, she states that separation put a strain on their marriage and resulted in divorce. To explain her testimony to ICE, claims that she was not advised of her rights, that the ICE officers were rude and abusive, and that she was coerced into signing the statement. She states that she recants all her earlier statements, written and oral.

- An undated, signed statement from the beneficiary in which he asserts that he and were married in good faith, but that his move to California in 2004 to pursue his dental license resulted in the breakdown of their marriage in 2006.

- May 23, 2008 affidavits from and states that he knew the beneficiary and in 2004, that they appeared to be a happy couple and that they were living together on in Chicago. indicates that introduced him to the beneficiary and that they were living together in Chicago in 2004.

- An undated affidavit from who states that he knew the beneficiary and when they were living together and that he lived in the same building;

- A statement, dated May 23, 2008, from who indicates that is his niece and that she and the beneficiary lived together in Chicago until the beneficiary moved to California

- A May 23, 2008 letter from the Assistant Manager, to the beneficiary in which she indicates that his joint account with has been paid in full.

- Online ticket confirmations and itineraries documenting that the beneficiary traveled back and forth between Los Angeles and Chicago on various occasions in 2004 and 2005.

- Two pages of a 2004 lease agreement that reflects ' ' as the renters of a one-bedroom apartment on the second floor of the building at in Chicago.

In response to the director's observation that the signature on June 30, 2009 affidavit does not match her signature on her divorce certificate, the petitioner submits a March 23, 2012 notarized statement from in which she attests that both signatures are hers, that the information contained in her June 30, 2009 affidavit is true and that her marriage to the beneficiary was bona fide.

Having reviewed the preceding evidence, the AAO does not find it to overcome 2006 testimony regarding the fraudulent nature of her marriage to the beneficiary. gave her June 27, 2006 statement under oath, which is not the case for her June 30, 2009 and March 23, 2012 affidavits. Moreover, pursuant to the director's decision, signature on her 2009 affidavit does not match that on the divorce document she signed on July 3, 2006, raising questions about the reliability of this document. Although ' March 23, 2012 statement claiming both signatures as hers is noted, it does not, by itself, resolve this issue. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988).

With regard to the documentation that was previously submitted in connection with the July 15, 2008 denial of a prior Form I-140 filed on the beneficiary's behalf, the AAO notes the documentation of the beneficiary's travel between Los Angeles and Chicago in 2004 and 2005 but also observes that the statement the beneficiary provided for the record indicates that he has family in Chicago and that he visited Chicago prior to meeting Accordingly, the fact of his travel to Chicago from California subsequent to his marriage to does not necessarily establish it as genuine relationship. The two pages of the lease agreement submitted for the record also do not demonstrate that the beneficiary and actually lived together prior to his departure for California. The petitioner has not submitted the signature page of the lease agreement, which would show the beneficiary and signed this document, nor has it submitted proof, e.g., cancelled checks or receipts, that would demonstrate their rental of the property. The May 23, 2008 letter from the Assistant Manager at regarding the beneficiary's and joint account also fails to establish their relationship. Without documentation of the beneficiary's and use of this account, the letter appears equally supportive of statement in her June 27, 2006 testimony that she and the beneficiary opened a fake bank account at bank.

The submitted affidavits regarding the cohabitation of the beneficiary and are also insufficient to demonstrate the genuineness of their marriage. The statements provided by and indicate that they knew the beneficiary and in 2004 and that the two were living together. , who identifies himself as uncle, also states that and the beneficiary lived together before the beneficiary's departure for California. Although these statements are noted, the AAO finds none to indicate the basis of the writer's knowledge of the beneficiary's and ' actual living arrangements, including whether they visited them at their home. The affidavit from who also attests that the beneficiary and lived together, states that he lived in the same building as the beneficiary and However, does not indicate the name or address of the building in which he lived or indicate why his residence in this building placed him in a position to know that the beneficiary and were living together.

For all of the reasons just discussed, the petitioner has failed to overcome the June 27, 2006 testimony provided by regarding the fraudulent nature of her marriage to the beneficiary, testimony that the AAO finds to constitute the substantial and probative evidence required for a finding of marriage fraud under section 204(c) of the Act.

A review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the beneficiary married solely for the purposes of evading U.S. immigration laws. Thus, the beneficiary is subject to section 204(c) of the Act and may not benefit from the instant Form I-140 petition. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.